2004

Alan R. Larsen v. Debra D. Larsen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ALAN R. LARSEN, Petitioner / Appellee	:	Case No. 20040630 - CA
v.	:	
DEBRA D. LARSEN Respondent / Appellant	:	BRIEF OF APPELLEE

APPEAL FROM SIXTH DISTRICT COURT, SEVIER COUNTY, UTAH

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JURISDICTION

Jurisdiction is conferred upon this Court pursuant to Utah Code Annotated, § 78-2a-3(2)(h).

ISSUES AND STANDARD OF REVIEW

1. While Appellant and Appellee were married they were members of a limited liability corporation that owned a hotel. When the hotel was sold, the four members of the corporation signed an agreement that in part allocated proceeds of the sale among the members. The trial court found that the proceeds so allocated to Appellant and Appellee constituted marital property and considered evidence of the agreement. Did the trial court err when it considered evidence of the agreement allocating proceeds among the members?

2. The trial court found that amounts owed to Robert and LaRue Larsen constituted marital debt. The trial court further found that regular payments on the debt, as well as other testimony and exhibits, amounted to an acknowledgment of the debt and that the debt was therefore not barred by the statute of limitations. Did the trial court err when it declined to apply the statute of limitations to the debt owed to Robert and LaRue Larsen?

3. The trial court found that amounts owed to Robert and LaRue Larson included debts on loans for business inventory and interest. Did the trial court err in so finding?

Standard of Review

There is no fixed formula upon which to determine a division of the properties in a divorce action, *Turner v. Turner,* 649 P.2d 6, 8 (Utah 1982), the trial court has considerable latitude in adjusting financial and property interests, and its action are entitled to a presumption of validity. *Savage v. Savage,* 658 P.2d 1201, 1203 (Utah 1983). Changes will be made only if there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion. *English v. English,* 565 P.2d 409, 410 (Utah 1977); *Eames v. Eames,* 735 P.2d 395, 397 (Utah Ct. App. 1987).

FACTS

This appeal concerns a divorce and related property division. The parties were married on August 9, 1974. Because of difficulties in the marriage that the parties were unable to resolve, Appellee Alan Larsen filed for divorce. On February 23, 2004 a bench trial was held before Judge Paul D. Lyman. Judge Lyman divided the marital property, awarded child support, and entered his Findings of Fact and Conclusions of Law.

After analysis of the parties' financial conditions, the trial court determined that the parties so commingled the assets and debts of their various business activities, and commingled business assets and debts with their personal assets and debts, that the court had to consider all assets and debts together when determining marital property. (Amended Findings of Fact & Conclusions of Law ¶ 19).

The parties, along with two other individuals, had been members of RCI, LC, a limited liability company. (Trial Tr. p. 128:17-19). Prior to the divorce, RCI, LC sold a hotel it owned and the four members signed a settlement agreement distributing the proceeds of the sale among themselves. In order to determine a division of assets in the divorce action the trial court heard testimony regarding the settlement agreement and the amounts received by appellant and appellee from the sale. (Trial Tr. p. 12-13; 34-37; 127-135; 178-180). Evidence was tendered and testimony proffered showing that appellee received $150,000.00 and that appellant received $200,000.00 from the sale of the hotel. (Trial Tr. p. 34:16-17; 35:4-6).

Over the years the parties had borrowed money from Robert and LaRue Larsen. The court heard testimony and took exhibits regarding these various debts. The court also heard testimony and took exhibits regarding payments made over time to service and in some cases retire various of these debts. (See, e.g. Exhibits 2, 12, 26, 27; Trial Tr. pp. 42-47; Trial Tr. pp. 81-83; 85-92; Trial Tr. pp. 154-57).

SUMMARY OF THE ARGUMENT

I. The trial court properly heard evidence of a settlement agreement between the parties

Under Utah law, The trial court's duty to make an equitable division of property in a divorce action encompasses all of the assets possessed by the parties. The trial court must distribute property between the parties in a fair, systematic fashion and should catagorize the parties' property as part of the marital estate or as the separate property of one or the other. Each party is presumed to be entitled to all of his or her separate property and fifty percent of the marital property. Once the trial court finds that an item is marital property, the law presumes that it will be shared equally between the parties unless unusual circumstances, memorialized in adequate findings, require otherwise. It is well established that the trial judge has considerable latitude of discretion in adjusting the financial and property interests in a divorce case.

It is the trial court's prerogative in divorce actions to make whatever disposition of property, including the rights fixed in settlement agreements, as it deems fair, equitable, and necessary for the protection and welfare of the parties. Although property settlements

should be given great weight in the court's determination of an equitable division, property settlements are not binding upon trial courts in divorce proceedings and the court need not necessarily abide by the terms of such agreements.

Nevertheless, Appellant asserts that the trial court erred when it heard evidence of a settlement agreement the parties entered into concerning the sale of a motel, a portion of which they owned as members of a limited liability company. Appellant is mistaken. Under Utah law it is proper for the trial judge to hear evidence of settlement agreements in divorce cases.

Appellant further asserts that evidence of the settlement agreement constituted surprise under Rule 59(a)(3), U.R.C.P. Appellant argues surprise based, not upon any lack of awareness of the evidence, but upon her claimed failure to anticipate that the trial court, in calculating a division of assets in the divorce, would consider amounts Appellant and Appellee received prior to the divorce from the proceeds of the sale of the hotel. Because the trial judge must characterize the property as marital property or individual property and then distribute property between the parties in a fair, systematic fashion, it cannot be a surprise that the trial court would hear evidence of the settlement agreement. Furthermore, under Utah law, a "surprise" at trial which could have been easily guarded against by utilization of available discovery procedures may not serve as a ground for a new trial. Here Appellant already had knowledge of the evidence and so cannot claim surprise.

Appellant asserts that the trial judge issued inconsistent rulings, first sustaining an objection to evidence that Appellant received $200,000.00 and Appellee received $150,000.00 for the sale of the hotel and then, ultimately, ruling that those were the amounts received by the parties. Here, Appellant misconstrues the trial record. Appellant objected to testimony as to why the parties received different amounts and asserted that the amounts due the members of RCI, LC were to be equal. The court ruled that the amounts from the sale to be credited the parties in the calculation of the division of assets would be equal. The court did not contradict itself or issue inconsistent rulings.

Appellant construes evidence of the amounts received by the parties for the sale of the hotel as a settlement compromise subject to the exclusionary rule of Utah Rules of Evidence, Rule 408. Rule 408 is inapplicable to the facts of this case since the amounts received by the parties for the sale of the hotel were never a claim which was disputed as to either validity or amount. Furthermore, the evidence in question was not to prove liability for or invalidity of the amount at issue. Rather, the evidence was to establish marital property for purposes of making an equitable division of property in the divorce.

II. The trial court did not commit error when it declined to apply the statute of limitations to the debt owed to Robert and LaRue Larsen

Appellant attacks the sufficiency of the trial court's findings with regard to marital debts owed to Robert and Larue Larsen, claiming the court erred in finding that the statute of limitations was inapplicable to the rental agreement. Appellant must fail in this assertion since Appellant failed to marshal evidence in support of the trial court's

findings. The court found the debt supported by acknowledgment "by both parties through the payments, exhibits, and credible testimony." Yet Appellant limits discussion of evidence of the debt's status to whether a particular exhibit constitutes acknowledgment of the debt. The trial court heard other evidence, ignored in Appellant's brief, that supported the court's finding that the statute of limitations did not apply. Furthermore, Appellant's argument as to the meaning of the exhibit mentioned above was raised for the first time in Appellant's Brief and therefore may not be considered.

III. The Trial Court did not commit error when it found that interest and inventory were a part of the marital debt

Appellant asserts that the court found that Appellant acknowledged a debt owed for inventory and/or interest on the amount owed to Robert and LaRue Larsen. However, there is no indication in the record that the trial court made any such finding. There is likewise no indication in the record that Appellant raised these points before the trial court. There is no discussion whatsoever in the record regarding the interest or inventory amounts to which Appellant refers. Appellant's argument is raised for the first time in Appellant's Brief and therefore may not be considered. Further, Appellant's Brief fails to discuss any evidence related to a finding that Appellant acknowledged the inventory or interest debt, much less does Appellant marshal the evidence supporting the findings as required under the law and then demonstrate that, despite the evidence, the findings are clearly erroneous.

ARGUMENT

POINT I

The trial court properly heard evidence of a settlement agreement between the parties

Appellant asserts that the trial court erred when it heard evidence of a settlement agreement the parties entered into concerning the sale of a motel, a portion of which they owned as members of a limited liability company. However the court was correct to consider evidence of the settlement agreement as doing so was necessary in order for it to distribute property between the parties in a fair, systematic fashion.

The trial court's duty to make an equitable division of property in a divorce action encompasses all of the assets possessed by the parties. *Dogu v. Dogu,* 652 P.2d 1308, 1310 (Utah 1982) (quoting *Englert v. Englert,* 576 P.2d 1274, 1276 (Utah 1978). The trial court must distribute property between the parties in a fair, systematic fashion and should "catagorize the parties' property as part of the marital estate or as the separate property of one or the other. Each party is presumed to be entitled to all of his or her separate property and fifty percent of the marital property." *Burt v. Burt,* 799 P.2d 1166, 1172 (Utah App. 1990). Once the trial court finds that an item is marital property, the law presumes that it will be shared equally between the parties unless unusual circumstances, memorialized in adequate findings, require otherwise. *Hall v. Hall,* 858 P.2d 1018, 1022 (Utah App. 1993). It is well established that the trial judge has considerable latitude of discretion in adjusting the financial and property interests in a divorce case. See, e.g. *Searle v. Searle*, 522 P.2d 697, 700 (Utah 1974).

The trial court found that the couple did not keep separate accounts and mingled together their personal assets and liabilities with those of their various business ventures. (Amended Findings of Facts & Conclusions of Law, ¶ 19). This presented a challenge for the court in determining how best to adjust the financial and property interests in the case. In response to Appellant's objection to evidence of the settlement agreement, the trial judge said, "The testimony is quite clear that everything was mixed and mingled." (Trial Tr. P. 128:6-7), and later: "I've got to come up with some number, because I'm going to find that these parties owned interest in these things and they were married at the time this happened." (Trial Tr. p. 132:18-21).

As will be discussed below, the trial court properly determined that evidence of the settlement agreement was necessary in order to make an equitable division of property and to distribute property between the parties in a fair, systematic fashion. The trial court was correct to consider evidence of the Settlement Agreement because the trial court must determine whether to be bound by its terms. Consideration of the evidence was not a surprise as contemplated by U.R.C.P. 59 as asserted by Appellant. The trial court did not reverse itself or make inconsistent rulings as asserted by Appellant. The settlement agreement was not a compromise or an attempt to compromise a claim which was disputed as to either validity or amount and so, contrary to Appellant's assertion, U.R.E. 408 does not apply to the facts of this case.

A. It was proper for the Trial Court to consider evidence of the Settlement Agreement as it is the Trial Court's prerogative to determine whether to be bound by the Agreement's terms

It is the trial court's prerogative in divorce actions to make whatever disposition of property, including the rights fixed in settlement agreements, as it deems fair, equitable, and necessary for the protection and welfare of the parties. *Pearson v. Pearson,* 561 P.2d 1080, 1082 (Utah, 1977); *Mathie v. Mathie*, 363 P.2d 779, 782-83 (Utah, 1961). Although property settlements should be given great weight in the court's determination of an equitable division, property settlements are not binding upon trial courts in divorce proceedings and the court need not necessarily abide by the terms of such agreements. *Naylor v. Naylor,* 563 P. 2d 184, 185 (Utah 1977); *Clausen v. Clausen,* 675 P.2d 562, 563 (Utah 1983); *Nunley v. Nunley*, 757 P.2d 473, 475 . Nevertheless, Appellant asserts that the trial court erred when it heard evidence of a settlement agreement the parties entered into concerning the sale of a motel, a portion of which they owned as members of a limited liability company.

In marriage, the parties mingled together their personal assets and liabilities with those of their various business ventures. (Amended Findings of Facts & Conclusions of Law, ¶ 19). This made it necessary for the trial judge to closely examine evidence of the couple's financial and property interests. The Trial Court was within its discretion to hear evidence of the Settlement Agreement to make whatever disposition of property, including the rights fixed in settlement agreements, as it deemed fair and equitable.

B. Evidence of the Settlement Agreement was not a surprise which ordinary prudence could not have guarded against as it was evidence of marital property that the court would properly consider in devising a fair distribution of property between the parties

Appellant argues that evidence of the amounts received by the parties for the sale of the hotel constituted unfair surprise. Rule 59(a)(3), U.R.C.P. provides grounds for a new trial if there was accident or surprise which ordinary prudence could not have guarded against. This section requires that the moving party show that ordinary prudence was exercised to guard against the surprise. *Powers v. Gene's Bldg. Materials*, Inc., 567 P.2d 174,n 176 (Utah 1977). Appellant does not argue that unfair surprise was caused by the introduction of any evidence or testimony about which she had no prior awareness. Instead, Appellant argues surprise based upon her claimed failure to anticipate that the trial court, in calculating a division of assets in the divorce, would consider amounts Appellant and Appellee received prior to the divorce from the proceeds of the sale of the hotel. (Appellant's Brief p. 4).

The trial court's duty to make an equitable division of property in a divorce action encompasses all of the assets possessed by the parties. *Dogu v. Dogu,* 652 P.2d 1308, 1310 (Utah 1982) (quoting *Englert v. Englert,* 576 P.2d 1274, 1276 (Utah 1978). The trial court must distribute property between the parties in a fair, systematic fashion and should "catagorize the parties' property as part of the marital estate or as the separate property of one or the other. Each party is presumed to be entitled to all of his or her

separate property and fifty percent of the marital property." *Burt v. Burt,* 799 P.2d 1166, 1172 (Utah App. 1990). Once the trial court finds that an item is marital property, the law presumes that it will be shared equally between the parties unless unusual circumstances, memorialized in adequate findings, require otherwise. *Hall v. Hall,* 858 P.2d 1018, 1022 (Utah App. 1993).

Here, the trial court found the proceeds from the hotel to be marital property, saying, "I've got to come up with some number, because I'm going to find that these parties owned interest in these things and they were married at the time this happened." (Trial Tr. p. 132:18-21). It is well established that the trial judge has considerable latitude of discretion in adjusting the financial and property interests in a divorce case. See, e.g. *Searle v. Searle*, 522 P.2d 697, 700 (Utah 1974). In light of the trial court's duty to make an equitable division of property and that this duty encompasses all of the assets possessed by the parties, it is simply not credible for Appellant to claim surprise that the trial court took into account amounts received by the parties before the divorce.

If Appellant felt that the amounts received for the sale of the hotel should not have been shared equally between the parties, Appellant could have argued to the trial court whatever special circumstances would, under *Hall*, require otherwise. Instead, Appellant merely objected to any testimony regarding the question. The actions of the trial court are presumed valid and it is Appellant's burden to prove such a serious inequity as to amount to a clear abuse of discretion. *Id.* at 700.

Furthermore, under Utah law, a "surprise" at trial which could have been easily guarded against by utilization of available discovery procedures may not serve as a ground for a new trial. *Anderson v. Bradley,* 590 P.2d 710 (Utah 1982). Here, Appellant had full knowledge of the agreement and can hardly claim surprise as contemplated by the Rule.

The trial court did not abuse its discretion when it considered evidence of the amounts the parties received from the sale of the hotel, nor did such evidence constitute surprise which ordinary prudence could not have guarded against.

C. Appellant misconstrues the record in arguing that The Court reversed itself and issued an inconsistent ruling

Appellant asserts that the trial court reversed itself and issued an inconsistent ruling. It did not. Appellant claims that the trial court sustained Appellant's objection to testimony that Appellee received $150,000.00 for the sale of the hotel and implies that the court did so in part because " there was no evidence to support the amount...as a correct representation of Petitioner's proceeds." (Appellant's Brief p. 5). But the court did not sustain any objection to testimony or evidence that Appellee received $150,000.00 for the sale of the hotel. Furthermore, when Appellant objected that there was no evidence to support the amount as a correct representation of Petitioner's proceeds, the court did not sustain Appellant's objection, but instead invited Appellant to cross examine Appellee under oath. (Trial Tr. p. 37:1-5)

What the court did sustain was Appellant's later objection to witness testimony

about why the amounts received by Appellant and Appellee were different. (Trial Tr. p. 131:6-24). Appellant's counsel told the court:

"...[A]ll we were really trying to do is take the sales price of 4.2 million dollars, subtract out all of the reasonable expenses that should be subtracted out to get to an equity, and then divide that by four.

"We did all of that, and the process resulted in my client getting $200,000. Now they're going to say, "No we overpaid her."" (Trial Tr. p. 134:1-8).

The court informed Appellant that if Appellant's objection were sustained, the court would find that both parties should receive $200,000.00 credit for the sale of the hotel. (Trial Tr. p. 132:18-22). Appellant asserts that this is inconsistent with the court's ultimate finding that Appellant received $200,000.00 and Appellee received $150,000.00. (Appellant's Brief, p. 5). But the court was clear that it was not ruling that the parties had each received $200,000.00 for the sale of the hotel. The court meant instead that each party should have received $200,000.00 and that the court would take that into account when calculating the division of assets. (Trial Tr. 135:7-12).

Appellant misconstrues the trial record in asserting the trial judge issued inconsistent rulings. The rulings of the court were consistent . The court never sustained any objection to evidence that Appellant received $200,000.00 and Appellee received $150,000.00 for the sale of the hotel. When Appellant objected to testimony as to why the parties received different amounts and asserted that the amounts due the members of

RCI, LC were to be equal amounts, the court ruled that the amounts from the sale to be credited the parties in the calculation of the division of assets would be equal.

D. Utah Rules of Evidence Rule 408 does not apply to evidence of the settlement agreement since the settlement agreement was not a compromise or an attempt to compromise a claim that was disputed as to validity or amount

Appellant construes evidence of the amounts received by the members of RCI, LC for the sale of the hotel as a settlement compromise subject to the exclusionary rule of Utah Rules of Evidence, Rule 408. Rule 408 provides that evidence of "accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount." Rule 408 is inapplicable to the facts of this case since the amounts received by the parties for the sale of the hotel were never a claim which was disputed as to either validity or amount. Furthermore, the evidence in question was not to prove liability for or invalidity of the amount at issue. Rather, the evidence was to establish marital property for purposes of making an equitable division of property in the divorce.

The trial court's duty to make an equitable division of property in a divorce action encompasses all of the assets possessed by the parties. *Dogu v. Dogu,* 652 P.2d 1308, 1310 (Utah 1982) (quoting *Englert v. Englert,* 576 P.2d 1274, 1276 (Utah 1978). The trial court must distribute property between the parties in a fair, systematic fashion and should "catagorize the parties' property as part of the marital estate or as the separate

property of one or the other. *Burt v. Burt,* 799 P.2d 1166, 1172 (Utah App. 1990). Furthermore, property settlements are not binding upon trial courts in divorce proceedings and the court need not necessarily abide by the terms of such agreements. *Naylor v. Naylor,* 563 P. 2d 184, 185 (Utah 1977); *Clausen v. Clausen,* 675 P.2d 562, 563 (Utah 1983); *Nunley v. Nunley*, 757 P.2d 473, 475 .

Since amounts received by the parties for the sale of the hotel were not a claim disputed as to validity or amount, and since evidence of such amounts was not to prove liability or invalidity of the amounts, and since trial courts in divorce proceedings have discretion whether to even abide by the terms of settlement agreements, Rule 408 is inapplicable to this case.

POINT II

The trial court did not commit error when it declined to apply the statute of limitations to the debt owed to Robert and LaRue Larson

Appellant attacks the sufficiency of the trial court's findings with regard to marital debts owed to Robert and Larue Larsen, claiming the court erred in finding that the statute of limitations was inapplicable to the rental agreement. Appellant must fail in this assertion since Appellant failed to marshal evidence in support of the trial court's findings and raised an argument as to the meaning of one of the exhibits for the first time in Appellant's Brief.

A. Appellant neither marshaled the evidence in support of the trial court's findings that the statute of limitations on the rent debt was inapplicable nor demonstrated that such findings were clearly erroneous

Appellant claims the trial court erred in finding that the statute of limitations was inapplicable with regards to the rent debt. The trial court found that an amount of debt for unpaid rent was not barred by the statute of limitations for purposes of including it as marital debt. (Amended Findings of Fact & Conclusions of Law, ¶19). The court specifically found that the debt was not barred by the statute of limitations because regular payments on the debt had kept it alive. Id. ("The Court finds that the majority of this debt of $101,000 is for past unpaid rent upon which the parties have made regular enough payments to keep this debt alive in the Court's opinion."). The court went on to say, "This debt is clearly not barred by the statute of limitations, it was acknowledged by both parties through the payments, exhibits, and credible testimony received here today." Id.

Appellant's brief limits its discussion of the issue to a narrow slice of the evidence the court heard in connection with the rent debt, arguing that a particular exhibit, Exhibit 27, does not constitute acknowledgment of the debt for purposes of determining whether the statute of limitations has run. But Appellant ignores other evidence considered by the court. For instance, the court accepted and considered Exhibits 2, 12, and 26 all of which

Appellant relied on to show payments made over time for rent. (Trial Tr. pp. 42-47). Appellant also ignores witness testimony concerning amounts paid over time for rent. (Trial Tr. pp. 81-83; 85-92). Furthermore, Appellant's own counsel acknowledged rent payments made at least as far back as the year 2000 – an acknowledgment that undermines Appellant's argument that the debt is barred and supports the court's contrary finding. (Trial Tr. pp. 154-57).

In order to prevail in overturning the trial court's findings, Appellant must marshal the evidence in support of the findings and then demonstrate that, despite such evidence, the findings are so lacking in support as to be against the clear weight of the evidence and, therefore, clearly erroneous. *Hagan v. Hagan,* 810 P.2d 478, 481(Utah App. 1991); *see also* Utah R. Civ. P. 52(a). Appellant has neither marshaled the evidence in support of the trial court's findings nor demonstrated that such findings are clearly erroneous. Appellant instead cites only the evidence that Appellate hopes will support Appellate's desired outcome, and ignores evidence supportive of the trial court's findings.

Evidence heard by the trial court supporting the finding that the debt is not barred by the statute of limitations includes evidence of regular payments made on the debt. Under Utah Code Ann. 78-12-25 (1) an action on a contract, obligation, or liability not founded upon an instrument in writing may be commenced within four years after the last charge is made or the last payment is received. Further, Utah Code Ann. § 78-12-44 says, "In any case found in contract, when any part of the principal has been paid, or an

acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the period prescribed for the same after such payment, acknowledgment or promise;..." Here, the trial court considered evidence of payments made on the debt and determined that the debt was not barred.

Appellant should not prevail in overturning the trial court's findings as Appellant neither marshaled the evidence in support of the trial court's findings that the statute of limitations on the rent debt was inapplicable nor demonstrated that such findings were clearly erroneous.

B. Appellant's argument that Exhibit 27 was intended only to demonstrate errors in Appellee's calculations is a new argument raised for the first time on appeal

Appellant argues in Appellant's Brief that Exhibit 27 was prepared "to demonstrate only for illustrative purposes that if the amount of the claimed rent owed to Robert and LaRue Larson were accepted, that Respondent's [Appellant's] equity in the business would still be an amount grater than had been previously offered by Petitioner to Respondent to resolve that part of the case." (Appellant's Brief, p. 12). But the portion of the record sited by Appellant to support this argument tells a very different story. "We were trying to figure out how much my client should get for Fashion Furniture. We had taken care of the motel matter and were trying to resolve Fashion Furniture. So these exhibits, the one No. 27 was prepared simply as her calculations of what she thought the value of the business was, what she thought she should receive." (Appellant's Brief p. 12, quoting Trial Tr. pp. 136-37).

The Utah Supreme Court has stated that the trial court must address an argument before it may be considered on appeal. *Ong International (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 455n.31 (Utah 1993). An argument is deemed to have been raised before the trial court if the trial court had an opportunity to enter findings of fact and/or conclusions of law. *James v. Preston,* 746 P.2d 788, 801 (Utah App. 1987).

Here, Appellant's argument from Appellant's Brief was not made to the trial court. Appellant's argument that Exhibit 27 was prepared "to demonstrate only for illustrative purposes that if the amount of the claimed rent owed to Robert and LaRue Larson were accepted, that Respondent's [Appellant's] equity in the business would still be an amount grater than had been previously offered," was not addressed by the trial court and the trial court had no opportunity to enter findings of fact or conclusions of law regarding Appellant's claim. Appellant's argument therefore may not be considered on appeal.

POINT III

The Trial Court did not commit error when it found that interest and inventory were a part of the marital debt

Appellant attacks the sufficiency of the trial court's findings with regard to marital debts owed to Robert and Larue Larsen, claiming the court erred in finding that a debt was owed for inventory and interest. Appellant's Brief asserts that the court found that Appellant acknowledged a debt owed for inventory and/or interest on the amount owed to Robert and LaRue Larsen. (Appellant's Brief, p. 13). However, there is no indication in

the record that the trial court made any such finding, so it is difficult for Appellee to know just what Appellant is arguing and how to respond. There is likewise no indication in the record that Appellant raised these points before the trial court. There is no discussion whatsoever in the record regarding the interest or inventory amounts to which Appellant refers. Appellant's argument is raised for the first time in Appellant's Brief and therefore may not be considered. Further, Appellant's Brief fails to discuss any evidence related to a finding that Appellant acknowledged the inventory or interest debt, much less does Appellant marshal the evidence supporting the findings as required under the law and then demonstrate that, despite the evidence, the findings are clearly erroneous.

A. Appellant's argument that the trial court erroneously concluded Appellant acknowledged debts for inventory and interest is a new argument raised for the first time on appeal

Appellant's assertion that the trial court found that Appellant acknowledged a debt for inventory and interest is made for the first time in Appellant's Brief. There is no mention in the trial record of any such finding by the trial court and Appellee has doubts as to whether Appellant is correct. Nevertheless, as Appellant's assertion is argued for the first time on appeal, Appellant's claim that the trial court found acknowledgment of the debts should not be considered.

To Preserve a substantive issue for appeal, a party must first raise the issue before the trial court. *Hart v. Salt Lake City,* 945 P.2d 125, 129 (Utah App. 1997). The trial court must address an argument before it may be considered on appeal. *Ong*

International (U.S.A.) Inc. v. 11th Ave. Corp., 850 P.2d 447, 455n.31 (Utah 1993). An argument is deemed to have been raised before the trial court if the trial court had an opportunity to enter findings of fact and/or conclusions of law. *James v. Preston,* 746 P.2d 788, 801 (Utah App. 1987). Even if the trial court did find acknowledgment of inventory and interest debts as Appellant asserts, Appellant made no mention of it until the time of Appellant's appeal and the issue therefore should not be considered.

B. Even if the trial court found that Appellant acknowledged the debts for inventory and interest, Appellant neither marshaled the evidence in support of the trial court's findings nor demonstrated that such findings were clearly erroneous

In order to prevail in overturning the trial court's findings, Appellant must marshal the evidence in support of the findings and then demonstrate that, despite such evidence, the findings are so lacking in support as to be against the clear weight of the evidence and, therefore, clearly erroneous. *Hagan v. Hagan,* 810 P.2d 478, 481(Utah App. 1991); *see also* Utah R. Civ. P. 52(a). Appellant has neither marshaled the evidence in support of the trial court's findings nor demonstrated that such findings are clearly erroneous. Appellant instead cites only the evidence that Appellate hopes will support Appellate's desired outcome, and ignores evidence supportive of the trial court's findings. Appellant should therefore not prevail in overturning the trial court's findings.

CONCLUSION

The trial court properly heard evidence of a settlement agreement between the parties. It was proper for the Trial Court to consider evidence of the Settlement Agreement as it is the Trial Court's prerogative to determine whether to be bound by the Agreement's terms. Evidence of the Settlement Agreement was not a surprise which ordinary prudence could not have guarded against as it was evidence of marital property that the court would properly consider in devising a fair distribution of property between the parties. Appellant misconstrues the record in arguing that The Court reversed itself and issued an inconsistent ruling. Finally, Utah Rules of Evidence Rule 408 does not apply to evidence of the settlement agreement since the settlement agreement was not a compromise or an attempt to compromise a claim that was disputed as to validity or amount.

The trial court did not commit error when it declined to apply the statute of limitations to the debt owed to Robert and LaRue Larsen. Appellant neither marshaled the evidence in support of the trial court's findings that the statute of limitations on the rent debt was inapplicable nor demonstrated that such findings were clearly erroneous. Appellant ignored evidence used by the court to determine that the debt was not barred. Appellant's argument that Exhibit 27 was intended only to demonstrate errors in Appellee's calculations is a new argument raised for the first time on appeal.

The Trial Court did not commit error when it found that interest and inventory were a part

of the marital debt. Appellant's argument that the trial court erroneously concluded Appellant acknowledged debts for inventory and interest is a new argument raised for the first time on appeal. Even if the trial court found that Appellant acknowledged the debts for inventory and interest, Appellant neither marshaled the evidence in support of the trial court's findings nor demonstrated that such findings were clearly erroneous.

For the foregoing reasons, Appellant's appeal should be denied on all counts and the trial courts well-reasoned findings and order should be upheld. Appellee Alan Larsen asks for an award of attorneys fees incurred on appeal.

DATED this 16 day of Nov 2005

DOUGLAS L. NEELEY
Attorney for Appellee

CERTIFICATE OF SERVICE

I do hereby certify that on this _____ day of November, 2005, I mailed a true and correct copy of the foregoing Brief Of Appellee, postage prepaid, to Gary H. Weight, Attorney for Appellant, at 290 West Center Street, P.O. Box "L", Provo, Utah, 84603-0200.

SECRETARY

ADDENDUM

Amended Findings of Fact & Conclusions of Law

Trial Transcript

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IN THE SIXTH JUDICIAL DISTRICT COURT OF SEVIER COUNTY

STATE OF UTAH

ALAN R. LARSEN	:	AMENDED FINDINGS OF FACT &
Petitioner,	:	CONCLUSIONS OF LAW
vs.	:	Civil No. 034600001
DEBRA D. LARSEN	:	JUDGE PAUL D. LYMAN
Respondent.	:	

The above-entitled matter came on for hearing on the 23rd day of February, 2004, before the Honorable Judge Paul D. Lyman. Petitioner appeared in person and was represented by his attorney, Douglas L. Neeley. Respondent appeared in person and was represented by her attorney, Gary Weight. The Court, having received evidence, the parties having testified in support of their pleadings, and the Court having heard argument of counsel, and being otherwise fully advised in the premises, now makes and enters its:

FINDINGS OF FACT

1. The Petitioner is a bona fide resident of Sevier County, State of Utah. and has been for more than three (3) months immediately prior to the commencement of this action.

2. Petitioner and Respondent are husband and wife, having been married on August 9, 1974, in the City of Richfield, County of Sevier, State of Utah.

3. During the course of the marriage, the parties have experienced difficulties that cannot be reconciled. The Petitioner should be granted a divorce from the Respondent based upon these irreconcilable differences which divorce should become final upon its entry.

4. During the marriage, there have been three (3) children born as issue of this marriage, two (2) of which have reached their majority. The remaining minor child of the parties is Dallan Robert, born July 7, 1988.

5. The Respondent is a fit and proper person to be awarded the care, custody, and control of the minor child, subject to liberal visitation with the Petitioner that includes, at a minimum, the frequency and schedule outlined in Utah Statute §30-3-35.

6. Both of the parties should be permanently enjoined from saying or doing anything in the presence of the minor child (or in such a manner that the child will become aware of the party's comments or actions) to convey any negative information, beliefs, feelings, etc., regarding the other

parent, or doing or saying anything that would in any way harm the relationship between the child or the other parent. Both parents are to encourage the creation and maintenance of a strong and healthy relationship between the other parent and the child. In no event shall either party demean or disparage the parent in the presence of the child, or permit any third party to do so.

7. It is important for the minor child to have contact with his older sisters, his paternal grandparents, and other relations as well. The Respondent should make a concerted effort to encourage and support these relationships, as they should encourage and support the minor child's relationship with the Respondent. This may involve allowing extra time for visits, allowing visits in her home, etc.

8. It is reasonable and proper that both parties be required to maintain in effect a policy of dental, health, and accident insurance, at all times that such may be available through their respective employers at a reasonable cost, with the minor child of the parties named beneficiary thereunder. Further, each party should pay one-half (½) of any deductible amounts, co-payments, and one-half (½) of all non-covered medical and dental expenses (including, but not limited to, accidents, surgery, orthodontics, ophthalmology, optometry [including eyeglasses], cavities/fillings, psychological and or psychiatric care, hospitalization, broken limbs, physical therapy, continuing illnesses, allergies, etc.) for said minor child.

9. A parent who incurs medical expenses shall provide written verification of the cost and payment of the expenses to the other parent within 30 days of payment.

10. Each party should reimburse the other party within 30 days for his or her share of any medical or dental expense that has been paid by the other party that are not covered by health insurance for the child.

11. Both parties should be entitled to receive a credit in addition to the base child support amount for one-half (½) of the monthly medical insurance premiums actually paid for the benefit of the minor child of the parties.

12. The custodial parent should be ordered to provide a copy of the Decree of Divorce to each creditor providing medical or dental services for the minor child. Pursuant to UCA §15-4-637(1953), each creditor should be notified by the custodial parent that the creditor is prohibited from making claim for unpaid medical expenses against a parent who has paid in full that share of the medical and dental expenses required to be paid by that parent by the Decree of Divorce. Each creditor receiving a copy of the Decree of Divorce should also be notified that the creditor is prohibited from making a negative credit report or report of debtor's repayment practices or credit history regarding a parent who has paid in full that share of the medical and dental expenses required to be paid by that parent by the Decree of Divorce.

13. Each party should pay one-half (½) of the cost of the custody evaluation, the business evaluation, and the appraisal on the home. By March 1, 2004, the parties should exchange documentation in regards to the amounts they have paid and the remaining balances.

14. The Petitioner should be awarded the income tax deduction for the minor child for the tax year 2003. The Respondent should receive the deduction for 2004, the Petitioner for 2005, and the Respondent for 2006.

15. In regards to alimony, the Court finds that the parties jointly owned the van and the furniture business together from 1984 until November of 2002. Both parties had an equal share in the job responsibilities in this business and all income derived from the business, including the payment of insurance, house payments, credit card payments, and other extra payments made by the business, was joint income to the parties, even though Mr. Larsen was given credit for the income from the sole proprietor business for social security purposes, it was still joint income. Consequently, the historical earnings for the parties are exactly the same and alimony is not appropriate in this case.

16. The Respondent is entitled to the standard formula for determining retirement money due to her. Because the parties chose to put everything under Mr. Larsen's name for income and social security purposes from 1984 to 2002, that will be the time period that social security should be treated for retirement. The denominator in the formula will be the period of the marriage with the

period from 1984 to 2002 as the numerator. The Court is considering this as retirement, but will not require a QDRO to be prepared because the Court does not believe you can file them against the Federal Government, but that formula will be applied. The Court is not directing Mr. Larsen to apply for social security, but whenever he chooses to do so, that portion set out above, using that formula, will be owed to Mrs. Larsen at the time he begins receiving those benefits.

17. In regards to the historical incomes of the parties, the Court cannot use those incomes because it appears to the Court that we have a business that is going through its last phases, it's going out of business, the hotel has been sold, Mrs. Larsen has no income and hasn't had any for some time. As set forth above, the parties had equal joint income for many, many years. Consequently, the Court is going to find that for child support purposes, Mr. Larsen has $1,500 per month in income earning ability at this time. Mrs. Larsen has income earning potential at $6.00 an hour for a full-time job, which computes to $1,032 per month and the Court is going to impute that income to her for child support determination, which the Court thinks is reasonable. Mrs. Larsen needs to get a job. Both of these earnings appear to be temporary and the Court would anticipate that either one of these parties, or both, will be filing a modification in the near future, based upon a change of the earnings of the parties, since their monthly claimed expenses exceed and in most cases triple or quadruple what they are both trying to tell the Court they can earn.

18. Based upon the foregoing, the Petitioner should pay $209 per month to the Respondent as child support for the minor child beginning February 15, 2004, and each month thereafter until the child reaches 18, graduates from high school, whichever occurs last, or until modified by the Court

19. The Court finds specifically in determining property values and to what is owed and not owed by the parties in regards to debts, both personal and business, that the parties commingled the assets and liabilities of the furniture business, the hotel business, and the personal business, which is evidenced by the way they used their business assets to purchase or finance personal assets, used their personal credit cards to finance and pay business debts, and used business assets and credit to pay other business debts or to acquire other business assets. For example, they used their personal van, which was paid for, to finance and pay debt incurred in the furniture business. The Court simply has to treat the entire assets and debts as a group. The testimony is that in regards to the sale of the motel, Mrs. Larsen received $200,000 and Mr. Larsen received $150,000, which leaves a $50,000 shortfall. The parties have stipulated that the business values and debts would be determined as of November 1, 2002, not today, consequently the Court will accept this date for its division of assets and debts. In addition, all of the evidence has come in with that date as the date to use in dividing up the assets and debts. The Court will use November 1, 2002, for its determination in dividing the

assets and debts of the parties, in valuing the assets of the parties, and in equitably dividing the same.

That Court has not addressed the values, debts, and assets as the attorneys argued it should, but rather as the Court determines the divisions to be equitable given the evidence and testimony received.

First, the Court will lay out the Robert and LaRue Larsen debts. These are monies owed to them by the parties. Respondent's Exhibit No. 26 acknowledges the debt owed for back rent and loans made to the parties. Petitioner offered Exhibit No. 12 which also illustrates, verifies, and acknowledges the same debt in the sum of $101,125.93 as of November 1, 2002. Each party offered an exhibit using the exact same figure and it appears to the Court that at an earlier date, each of the parties acknowledged and agreed that this sum was owed to Robert and LaRue Larsen. This debt did include the $15,000 loan. However, the $42,000 was paid back with interest and this figure of $101,125.93 does not include this loan. When the Court goes through the schedules, the two (2) loans are clearly accounted for with the $42,000 having been paid, with interest, in September of 2001. The Court finds that the majority of this debt of $101,000 is for past unpaid rent upon which the parties have made regular enough payments to keep this debt alive in the Court's opinion. This debt is clearly not barred by the statute of limitations, it was acknowledged by both parties through

the payments, exhibits, and credible testimony received here today. The Court finds that this debt is Alan's and he is to hold Debbie harmless on this debt.

20. Now, turning to the other business debts and again using the November 1, 2002, date, the first debt illustrated on Exhibit 6 and then on Exhibit 18. It showed that there was $18,978.49 in the furniture business account on November 1, 2002. The Court has gone through and added the checks, not accepting Petitioner's counsel's figure, and the Court comes up with $27,468.18, a shortfall of $8,489.69. The second debt the Court has considered is the accounts payable debt from Exhibit 7 where the parties agreed the $7,132.31 was duplicate of Exhibit 6 and 7, the Court did not take it off of Exhibit 6, but the Court is taking it off of Exhibit 7. The Court finds then that from the $46,811.46, less the $7,132.31, the net accounts payable are $39,679.15 as of November 1, 2002.

21. The next debt the Court considers are the credit card debt balances as of November 1, 2002, that come off of Exhibits 3 and 29. The total there was modified by the parties during trial and the Court finds that the total owed on the credit cards as of November 1, 2002, was $22,742.23.

22. The second mortgage on the house was clearly done for business purposes and again illustrates the commingling of the business assets and debts with the parties' personal assets and debts. The Court finds that the balance owed on the second mortgage as of November 1, 2002, was $21,869.38 which is found on Exhibit no. 10. Likewise, the van debt was clearly incurred by the

parties for business purposes and the Court finds that the debt owed is $10,731.14, exactly as stated on Exhibit no. 11. Lastly, the Court heard testimony in regards to the credit card debt incurred after the parties' separation. Alan said the debt was incurred, Debbie said it wasn't, that is from Exhibits 4 and 30. The Court is finding that Debbie did in fact incur $5,623.04 of credit card debt after the parties' separation of November 2002.

23. Having considered all of the debts, the Court finds the total to be $109,134.63 in debts which are business debts which should be paid by Alan and hold Debbie harmless from those debts, which the Court notes include the second mortgage and the van debt, which will become relevant below.

24. Now there are a couple of other loose ends that need to be addressed by the Court. There are two (2) debts that Debbie proved she should have received one-half (½) of. First, in regards to the tax refund. The Court finds that Debbie's story is more believable than Alan's story and the Court finds that the refund was in fact $1,186.19. The second amount was the balance in the parties' personal checking account in Zions Bank in November of 2002. The total of those debts the Court finds is $5,761.99, which Alan received. One-half (½) of those two (2) amounts is $2,881, which should be paid or credited to Debbie.

25. On the other hand, we have Alan who paid for the family's health insurance, Alan and Debbie's life insurance, and the van insurance. The portion that is for the family health insurance is a family obligation and if someone would have gotten sick or hurt, the parties would have had to pay those expenses, so the Court declines to give Alan any credit for those payments. However, on the life insurance in the sum of $4,912 and the van insurance of $978.40, these were all for Debbie's benefit, totaling $5,890.40, the Court does not consider those payments, made by Alan, to be a family obligation, and Alan should get credit for this amount.

26. In regards to the marital home of the parties, the parties have stipulated the value to be $150,000 on November 1, 2002, and the Court so finds. The balance owed on the first mortgage was $88,803, which was also not disputed by the parties. The Court finds that the net equity in the marital home to be $61,197.

27. The business evaluator found the furniture business value to be between $300,000 and $325,000. The parties' counsel both stated that the evaluator said it was worth $300,000 on the phone when they each questioned him about that and the Court considers those representations together with the Court's finding that this business was and is a failing venture. Based on the foregoing, the Court finds the appropriate and fair value of the business to be $300,000 on November 1, 2002.

28. Having considered the foregoing and having made findings in regards to the assets, both personal and business, the debts, both personal and business, and each parties' respective obligations and credits, the Court makes the following findings and conclusions of law in equitably dividing the assets and debts of the parties in this matter as of November 1, 2002.

A. Debbie is awarded the marital home which value is $150,000, less the first mortgage of $88,803, leaving a total net equity of $61,197. One-half (½) of that equity should be awarded to Alan in the sum of $30,598.50, which should become payable upon the house selling, Debbie moving from the home, cohabits, remarries, or the minor child turns eighteen (18), whichever occurs first. No interest shall accrue on the lien of $30,598.50 in favor of Alan, but which is a set amount of money that will be paid within about three (3) years or sooner.

29. Now in regards to the businesses of the parties, the Court finds it appropriate and equitable to divide he same as follows, giving each party the credits and obligations set out above. Alan should be awarded the furniture business. The furniture business value is $300,000, less the Robert and LaRue debt of $101,125.93, which was affirmed by both parties by testimony and their respective written statements, less the other business debts and credit card debts found above totaling $109,134.63, which Alan should be ordered to assume and hold Debbie harmless therefrom, which leaves a total net equity in the business of $89,739.44. Debbie's net equity from the business is

$44,869.72, which represents 50%. However, from this net equity, the Court needs to look at other factors and equities. Debbie received $50,000 more than Alan from the hotel sale. Alan paid $5,890.40 after the separation that directly benefitted Debbie and for which he should get credit, which totals $55,890.40, which should be paid by Debbie to Alan, less the amounts Alan already received from the bank accounts and tax refund of $5,761, leaving $53,009 total that is owed to Alan by Debbie.

30. However, when the Court applies the equity Debbie has in the furniture business awarded to Alan of $44,869.72 against the amount owed to Alan from Debbie of $53,009, her net equity in the business is totally wiped out because she has already received $8,100 more than Alan. Alan would be owed the $8,100 in total net equity from the two (2) businesses. The Court is not required to make things even or divide equities exactly and it declines to do so in this matter. The Court will not require Debbie to pay this $8,100 difference, it is just fiction, a nominal amount given the figures the Court has dealt with in this case and the equities applied. Alan is awarded the business with the debts listed above and Debbie does not have to pay him back for the monies she has already received. He doesn't have to pay her back for the tax refund and the checking account balance, this is what the Court believes is fair and equitable in this matter and the Court is going to find that the division set forth herein is fair. All of these figures the Court sees are questionable things that everybody had

argued about all day like the back rent owed, which I have clearly found in Alan's favor. He may never pay his parents the rent and loan owed, but it clearly is a legitimate debt that was owed by the parties on November 1, 2002. That is why I have divided and found as I have so that there is a clear break between these parties and the entanglements they have encountered during the marriage. This division allows for a clean break. When the minor child reaches eighteen (18) years of age or any of the other events occur outlined above, Debbie will owe Alan his equity from the marital home, otherwise the parties are divorced and no longer connected in any businesses or entanglements.

31. The parties have acquired personal property during the marriage. Alan will draft two (2) lists of the personal property items including those in the home, the personal property at the store, and the truck and van. Said lists will be presented to Debbie on or before March 8, 2004. Debbie will pick which list of property she wants and should be awarded the same. Alan then will be awarded the property identified on the remaining list. Each party should be awarded the personal property they have acquired since separation in November 2002.

32. Each party should bear their own costs and attorney's fees incurred herein.

33. Each party should be ordered to execute and deliver to the other such documents as are required to implement the provisions of the Decree of Divorce entered by the Court.

34. Should either party fail to abide by the provisions of a Decree of Divorce issued herein, that party should be liable for indemnification of the other, including attorney's fees and Court costs incurred in the enforcement of the Decree of Divorce.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties in the above-entitled matter, and the parties are entitled to a divorce on the grounds of irreconcilable differences.

2. The parties should be awarded a Decree of Divorce, to become absolute and final upon entry by the Court herein.

3. The Court concludes that all other issues of dispute have been resolved by the Court pursuant to the above Findings of Fact.

DATED this _____ day of July, 2004.

JUDGE PAUL D. LYMAN
District Court Judge

TO THE PARTIES ABOVE-NAMED:

Pursuant to Utah R. Civ. P. 7(f)(2), this proposed Order will be filed with the Court five days after service upon you. Your objections, if any, must be filed with the Court within five days after service.

CERTIFICATE OF MAILING

I do hereby certify that on this _____ day of July, 2004, I mailed a true and correct copy of the foregoing proposed Amended Findings Of Fact & Conclusions Of Law, postage prepaid, to Gary H. Weight, Attorney for Respondent, at 43 East 200 North, P.O. Box "L", Provo, Utah 84603-0200.

SECRETARY

CERTIFICATE OF MAILING

I do hereby certify that on this _____ day of July, 2004, I mailed a true and correct copy of the foregoing signed Amended Findings Of Fact & Conclusions Of Law, postage prepaid, to Gary H. Weight, Attorney for Respondent, at 43 East 200 North, P.O. Box "L", Provo, Utah 84603-0200.

SECRETARY

Replacement

IN THE SIXTH JUDICIAL DISTRICT COURT
OF SEVIER COUNTY, STATE OF UTAH

ALAN R. LARSEN, Petitioner, vs. DEBRA D. LARSEN, Respondent.	ORIGINAL Case No. 034600001

Bench Trial
Electronically Recorded on
February 23, 2004

BEFORE: THE HONORABLE PAUL D. LYMAN
Sixth District Court Judge

APPEARANCES

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Transcribed by: Beverly Lowe, CSR/CCT

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THE COURT: Ckay.

MR. WEIGHT: Totally liquidated. That will leave some personal -- or some business property; a truck, a trailer, a computer, some of those other items. I guess that then becomes personal property, and how that should be divided I guess is an issue.

THE COURT: That's fine. Attorney's fees at issue or not?

MR. NEELEY: I think usually we would say each pay their own.

THE COURT: Okay, each pay their own, and a name --

MR. NEELEY: There is one issue.

THE COURT: Will there be a name change?

MR. NEELEY: No.

THE COURT: No? Okay, go ahead, sir.

MR. WEIGHT: There is an issue of -- this may just go into personal property, but there is an issue of the tax refund that came shortly after the separation, and we think it's not a personal property and that needs to be shared. Then we disagree that the RCI, that is the motel business here in town, is an issue, but I guess we just (inaudible) that.

In other words, we believe we've been before the Court and we've stated to the Court that that has been resolved. That by agreement, it was not one of the issues that we think was reserved for today. The business was sold. They took

their -- they all signed an agreement as to what their shares were. She received her share.

If it's disproportionate that's not our fault. We agreed to what her share was. So we now disagree that we can bring that back in to try to modify any amount that she received from that settlement or have it affect any amounts that she may receive from additional assets. I think that's a -- we can argue that, I guess, is what --

THE COURT: Yeah. I think you need to argue that, and why are we picking November 1st, 2002?

MR. NEELEY: It's when they split.

MR. WEIGHT: Separation date.

MR. NEELEY: Separation.

THE COURT: So you want me to make these divisions as of that date, and not as of today?

MR. WEIGHT: With respect to the --

THE COURT: And both parties agree with that?

MR. WEIGHT: -- with the business, Fashion Furniture

THE COURT: With the -- okay, and that's stipulated to?

MR. WEIGHT: That's right.

THE COURT: Because normally I would divide it as of today, what the assets were today, but if you folks were agreeing that it's November 1st, 2002, on the record stipulating to it, that's fine. I'll do it as of that day.

MR. NEELEY: For Fashion Furniture that's what we've

and did that for two years.

That they had an opportunity to sell the business. They no longer wanted to be partners. His brother Jerry -- Alan and his wife wanted to be out and no longer wanted to be partners. So they have actively attempted to sell the business. They've had several offers.

They eventually got an offer last year that they all wanted to take. They attempted to get Mrs. Larsen to negotiate with them -- Mrs. Debra Larsen, the defendant -- to negotiate with them and to help them in closing the transaction. It was an LLC that Mr. Chamberlain had drafted for them, and pursuant to that LLC the majority are able to sell the property.

She was still putting up a resistence to that, and it came to the point where they were going to lose the sale, and Jerry Larsen agreed to give her $200,000 from the sale proceeds in order to save the sale. Alan Larsen would testify that he received $150,000 from the sale of the motel. So together the marital receipt was $350,000 total from the sale of the motel.

MR. WEIGHT: Your Honor, can I interpose my objection. I have already indicated to the Court that I would object to it as part of the proffer, and ask that it be stricken for this reason. He's testified about some of the negotiations which have occurred, and the parties have been paid, and that is not an issue. That has never been reserved as an issue. We've been before the Court and represented that that was done.

So it can't come back in, but if it's going to come back in, if the Court's going to allow that testimony, then I have a copy of the escrow instructions and waiver agreement that I will submit to the Court as an additional exhibit, which is signed by all the parties, and agrees in there that her share is $200,000. It makes no mention of any disproportionate division.

Makes no mention of any distress -- I mean, a worry of losing a sale. It's a hand -- or an arm's length, clean transaction between all these parties where they agreed based upon evidence we presented and their evidence, that her share in that business was $200,000.

MR. NEELEY: He can offer that, and I don't dispute anything he said, but the fact of the matter remains that that was an asset that was obtained during the marriage --

THE COURT: I'll look at your evidence, because if -- that would be -- I think that's reason -- or not reasonable -- relevant evidence. So I'll go take a look. Go ahead and offer that and show me that.

MR. NEELEY: But our response is, objection would be that these parties received proceeds from an asset that was totally obtained and (inaudible) during the marriage, and the $350,000 is what came to the parties from that asset.

MR. WEIGHT: Assuming -- the second part of my objection goes to this, your Honor. He represents today that

THE COURT: The hangup, Mr. Weight, is this. This is a proffer. If you don't want to accept it, you want to cross examine Mr. Larsen as to what he actually received, I'll put him under oath. I'll allow you to do that. If he's lying, then it's perjury and it would make a difference, okay?

MR. WEIGHT: Well, and I appreciate that, your Honor, and I know we can do that, but I think -- my objection doesn't go to whether or not he got 150 necessarily. We don't know that except for his work. My objection is that this part of the case is settled. We aren't even dealing with this. She got her share, he got his share. If they're disproportionate it was done by agreement.

MR. NEELEY: That had nothing to do with the divorce action.

MR. WEIGHT: It does.

MR. NEELEY: That was an LLC to split up --

MR. WEIGHT: But the LLC they owned, as a marital asset, their portion of the LLC.

THE COURT: Okay, let's go onto some other issues.

MR. NEELEY: All right.

THE COURT: And you can provide whatever documents you want to show the other.

MR. WEIGHT: Thank you.

THE COURT: Go ahead, Mr. Neeley.

MR. NEELEY: In addition to the $42,000, your Honor,

MS. LARSEN: Alan and she had that together.

MR. WEIGHT: Who wrote it?

MS. LARSEN: Alan.

MR. WEIGHT: Okay. It's the handwriting of Alan Larsen written on this exhibit, and my client will testify that the exhibit is an exhibit that was produced by Mrs. Larsen, the mother. It's her own document, and at the top of it is written 1050 per month, it looks like, 7/7/02, and the conversation that occurred regarding that notation was that she said at that time there would be no rent due prior to July 7th of '02, but rent would be at the rate of 1050 a month after that, and if it was paid and continued to pay it, that the back rent would be forgiven.

So we show the Court this document, and then we also have attached to it the history of the payments, and the next two pages after the first page, and then there's two pages after that -- or three pages after that that show the amounts -- and again, your Honor, these are the disputed documents, disputed documents Mr. Larsen -- or Mr. Neeley says he doesn't want in because they're part of the settlement negotiation, but these were not prepared by my client. These were prepared by Mrs,. Larsen or by Alan Larsen.

The last page, the very last page shows a composition of the rent that would be due if the Court gives credit for the payments that are reflected on the documents in the last four

years. So that's what her testimony would be and that's what these exhibits purport to show.

THE COURT: Okay.

MR. NEELEY: I don't know (inaudible). Could I look at that exhibit?

THE COURT: Yes.

MR. WEIGHT: Should I just put it there.

THE COURT: You want it?

MR. WEIGHT: Yes.

MR. NEELEY: Is it part of Exhibit 2, this right here?

MR. WEIGHT: Yes.

MR. NEELEY: This?

MR. WEIGHT: Yes.

MR. NEELEY: Your Honor, I'm objecting to the -- to that exhibit.

THE COURT: Okay.

MR. NEELEY: And let me state the objection, and I'll give the Court --

THE COURT: Go ahead.

MR. NEELEY: -- another exhibit to verify what I'm saying. My objection is that these documents were given to Counsel both before Mr. Weight entered the picture and after Mr. Weight entered the picture, and I'm going to offer Petitioner's Exhibit No. 26.

On the top of that exhibit, it comes from Ogden

Carpets. That is Jerry Larsen. He did the accounting for the senior Mr. and Mrs. Larsen. The date on that is 11/03. Those documents were prepared and presented to Counsel and his client and Counsel before in settlement negotiations. That's what their intent was for, and that's how they got them, and I object to his use of those settlement negotiation documents to draft any of the other documents.

MR. WEIGHT: And my response to that would be is he saying that these documents are not true and accurate and reflect the actual accounts then --

MR. NEELEY: But he's purporting them to be that they agreed that -- with their theory of the case, that all payments ought to be applied as they are received. We offered a total computation of all the things of the parties, and parties were talking about that settlement negotiations, what's owed to the Larsens because of all the back rent and all of the -- everything they've borrowed them over the years. So we prepared that document.

THE COURT: But -- and I asked this question earlier. Are the facts that are stated in these things true? I think you answered, "Yes."

MR. NEELEY: They are true.

THE COURT: Because I don't see here what I would typically see in a settlement negotiation is. Here's what we think you owe. This is what you think we owe. We'll pay

X, okay? Which then indicates to me a willingness to pay something above whatever would be the math you're -- you're saying you're willing to do, but not as much as the other side. I don't see any of that in discovery.

MR. NEELEY: Because --

THE COURT: Do you see what I'm saying, Mr. Neeley? I don't see any kind of a --

MR. NEELEY: I do, because the response that we got back -- and I'll -- if you want me to, I will enter a document they gave back, and it was prepared by Debbie in settlement negotiations, and she uses our figure of $101,000 owed to the Larsens, but I don't think that's fair to do because that's settlement negotiations. If she gave us back a document that says, "Likely the inventory is this. Here is what the Larsens -- here's what we owe the Larsens, $101,000," and that's a document she prepared.

THE COURT: You can certainly put her on the stand and ask her if at that point she agreed -- or she felt like or whatever -- I don't know what the circumstances were.

MR. NEELEY: We were doing settlement negotiations, though. I don't -- I mean, I think the rules preclude me from asking her about it, but if we're going to open that door then I will ask her that. I've got the documents she prepared.

THE COURT: Frankly I --

MR. WEIGHT: My understanding about his argument, your

Honor, is he's suggesting that because it was presented in settlement negotiations it's different than what it would be without the settlement negotiations. I think he's answered that.

THE COURT: See, Mr. Neeley, that's the trouble I'm having. If it's a fact -- if it's a fact, it's a fact, it's a fact. If it's a settlement offered for some different figure, I will not consider that. Now, I see what you're saying, is Ms. Larsen does not say today that she felt like they owed $101,000. Do think she's not going to say that?

MR. NEELEY: No, she's not going to say that. She's going to -- I'm sorry, he just put their exhibit. They're saying that -- they're using our exhibit we used in the settlement negotiations to support her statement today that she only owes $16,000 to the Larsens, when in settlement negotiations she said she owed $101,000, and her document says that.

THE COURT: And what is this document you've got? Is it a letter?

MR. NEELEY: Well, it's a computation just like that.

THE COURT: So it's more stuff like this. Well, I can ask her the same question. Is it a fact or is it not a fact? I'm going to allow you to introduce whatever you want, Mr. Neeley.

MR. NEELEY: Okay.

THE COURT: I think the door is wide open. It's been opened by Mr. Weight, and I'm not seeing the traditional stuff I see in settlement negotiations.

MR. NEELEY: Well, because there were cover letters with, and then he said, "Here's what our client's prepared."

THE COURT: Oh, okay. All right, but still I'm not seeing the cover letter where you say, "Okay, you give me 50 or 75 or 35, and even though I think it's this, it's --" because that's the stuff we usually see in settlement negotiations.

MR. NEELEY: I agree that's usually what we see when there's reasonable minds.

THE COURT: That's right. So go ahead, Mr. Weight, please.

MR. WEIGHT: Your Honor, let's go to the next exhibit, No. 13, is a group of documents. The first of that is the summary. Then the remaining pages are backup.

If the Court will look at the first page, what we're doing here is attempting to help the Court understand the income of Mr. Larsen. Mr. Larsen was paid by Fashion Furniture a salary, but in addition Fashion Furniture paid certain of his personal debts, which for IRS purposes might give him a lower income for tax recording, but not for computation of income for child support or alimony.

So we've set forth on the page by month the additional payments Fashion Furniture made for Mr. Larsen that were more

MR. WEIGHT: 2000.

THE COURT: -- 2000, that is the combined earnings of you two, not --

THE WITNESS: Yes.

THE COURT: -- just your earnings?

THE WITNESS: Correct.

MR. WEIGHT: After that they incorporated and started paying wages.

THE COURT: Okay. Got a couple more questions.

THE WITNESS: Sure.

THE COURT: The exhibit you've got. Do we --

THE WITNESS: This one?

THE COURT: Yeah. Your mother wrote this, right? Is that her writing?

THE WITNESS: It is on the top, yes.

THE COURT: Okay, except for --

THE WITNESS: Except for my writing on the very top.

THE COURT: The little scribble at the top with the 77. All right. Does someone have a copy he can be given, and if you want to look over his shoulder, Mr. Neeley. When I look at page 3 of that exhibit I see what is 7 -- you know July of '02, and in column 3, which is called "Payment," I see four straight months of $1,050. So I assume that that means that you paid and she credited you with paying that $1,050 for those four months; is that right?

THE WITNESS: Well, I don't know if it was for those four months, but we made that payment.

THE COURT: Made the four payments in those four months?

THE WITNESS: Those payments during that time, yes.

THE COURT: All right, hang on. Then you missed a month, be November.

THE WITNESS: Okay.

THE COURT: And then you made two more. Whose computer printout is this -- these pages?

THE WITNESS: That's Jerry's.

THE COURT: Jerry's? What did Jerry have to do with this?

THE WITNESS: He was just helping put this on a spread-sheet, make sense of it.

THE COURT: Okay. On January of '02 you have $42,650 applied to rent; is that right?

THE WITNESS: Yeah, that's -- that amount would have been towards rent.

THE COURT: Okay, and that's the $42,650 that came from where?

THE WITNESS: That money is money that we got from borrowing, I think, from my parents, or at least that amount of money.

THE COURT: So they loaned you that money. If I

understand the testimony right, you stuck that in the hotel?

THE WITNESS: Yes.

THE COURT: But when you paid it back to them, for some reason it was credited towards the rent?

THE WITNESS: Yeah, that's right.

THE COURT: Why?

THE WITNESS: Because we owed so much rent.

THE COURT: Okay.

THE WITNESS: That was intended to catch up, get it paid.

THE COURT: And that was the money that was loaned out in September; is that correct?

THE WITNESS: Yeah, that is.

THE COURT: So you two, from everything I can see from this, mixed and mingled the accounts at the furniture store, along with the accounts from the hotel; is that right?

THE WITNESS: And personal, too.

THE COURT: And personal.

THE WITNESS: The furniture store paid a lot of our personal bills at that time. It did really mix.

THE COURT: I have no other questions right now. If either of you have questions.

CROSS EXAMINATION (resumed)

BY MR. NEELEY:

Q. And visa-versa; you also used personal credit cards,

at least $20,000 sometimes to pay for store debts?

A. Absolutely.

Q. From personal credit cards?

A. Yes.

Q. And you used the vehicle --

A. I think more than that.

Q. -- you used that as collateral and put that back into the business also?

A. Exactly. That's what I did.

MR. NEELEY: Okay. I think that's all the questions.

THE COURT: Do you have any questions you want to ask him, Mr. Weight?

MR. WEIGHT: No further questions of this witness. I call LaRue Larsen.

THE COURT: Okay. Mrs. Larsen, if you'll come forward, ma'am, stand in front of her and raise your right hand, please.

COURT CLERK: You do solemnly swear the testimony you're about to give in the case now before the Court will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE COURT: Go ahead and have a seat over there, please.

MR. WEIGHT: Did the Court get back No. 12?

THE COURT: Yes. Which is 12? That's the one I was

just looking at? Yeah. Do you need it?

MR. WEIGHT: Yeah.

THE COURT: Okay.

LARUE LARSEN,

having been first duly sworn,

testified as follows:

DIRECT EXAMINATION

BY MR WEIGHT:

Q. Will you please state your name.

A. LaRue Larsen.

Q. And you're the mother of the petitioner in this case?

A. Yes.

Q. I've handed to you what has been admitted as Exhibit 12; do you see that?

A. Uh-huh.

Q. Is the handwriting on the document except for what is right at the very top your handwriting?

A. Yes.

Q. Was it your practice to make a ledger like this one and to give it to your son and his wife each year?

A. I'm not sure that I gave it to them, but I tried to keep track of when they paid rent.

Q. Until beginning of 1994, which is the entry on the top of the page, is that when you first started this particular exhibit?

A. No, I have others at home.

Q. I'm sorry?

A. I have others since 1984.

Q. Okay, but that page right there, do you think that page was started in 1994?

A. I'm not sure. It probably was.

Q. You see the first page at the top. It says, "1994," and then there's some months and dates listed below that.

A. I may have gotten -- gone back to this on this time. I'm not sure.

Q. I just asked you if.could you see those dates.

A. Which dates?

Q. At the very top, and then the word date you see the No. 1994.

A. Yes.

Q. That represents the year 1994; is that correct?

A. Uh-huh.

Q. And then below that there's a 1-9 and 5-6; do you see those?

A. Uh-huh.

Q. Isn't it true that in that year you started this ledger, and then you filled in that information each month as -- you filled it in as those months occurred?

A. I didn't. I think that I'd gone back and written down what I've had down before.

Q. Pick a needle. Do you know if you did or are you not sure?

A. I haven't kept adding on it, because it's -- I've gone back and filled in where I've kept record of them.

Q. Okay. Look at the bottom where you come to the year 1999. Do you see that?

A. Uh-huh.

Q. It shows an entry on 7/6 of '99 and 11/29 of '99. The first entry is $5,000 and the second entry is $10,000; do you see that?

A. Yes.

Q. And is that a payment that was made to you by Alan and Debra; those two payments?

A. I think so.

Q. And then --

A. It must be.

Q. Then at the very bottom there's 2001, and under that it says, "1-17," and then "$12,600"?

A. Uh-huh.

Q. And then to the right of that "for year 2000"?

A. Uh-huh.

Q. In other words --

A. In other words they were paying late all the time.

Q. This is a late payment that you credited for 2000, right?

A. Because I put a question mark there. That's right.

Q. And then if you'll look at the next page, and then go one more. Are you at the third page?

A. Uh-huh.

Q. And near the middle of the page it's got the date that says, "September-'01."

A. Uh-huh.

Q. There is the entry of $1,050, and then to the right of that $42,000; do you see that?

A. Uh-huh.

Q. That's the payment that was made -- or I mean, a loan that was made by you and your husband to your son and daughter-in-law?

A. Right.

Q. And then you go down to where it says, "January '02;" do you see that?

A. Uh-huh.

Q. And to the right of that, should be in the very middle of the page, there is an entry of $42,650?

A. Uh-huh.

Q. That represents a repayment of the loan, $42,000; doesn't it?

A. I think so.

Q. And when the payment was made, you commented to Debra that you've paid 42 -- you've paid $650 additional, and she

says, "That's for interest." You said you weren't expecting any interest, and she says, "Well, but you deserve it." Do you remember that conversation?

A. I didn't know that I wasn't -- yeah, I don't know.

Q. Do you remember her commenting to you that she was paying you interest for the $42,000?

A. Yes, I remember a comment and she was saying interest.

Q. Okay. Then did you ever tell her that you were going to apply the $42,650 toward rent as opposed to the loan payment that you were talking about that she paid?

A. No.

MR. WEIGHT: That's all.

THE COURT: Mr. Neeley.

MR. WEIGHT: Your Honor, I just have two more questions or one, maybe.

THE COURT: Go ahead.

Q. BY MR. WEIGHT: Okay. On top of that same exhibit, Mrs. Larsen, on the front page, can you see an entry that says, "Due," and then there's some lines and then there's "1050," and it looks like the words "per/mo, 7/7/02;" do you see that?

A. Is it on the very front?

Q. Yes, the very, very top of the page at the right-hand side; do you see that?

A. I don't.

THE COURT: It's in different handwriting.

Q. BY MR. WEIGHT: Right here.

A. Oh, here.

Q. Yeah.

A. Okay.

Q. Is that your handwriting?

A. No.

Q. Do you recall a conversation you had with Mr. Larsen when he returned from a trip he took to Las Vegas, and where you told him that he and his wife would no longer have to pay any back due rent as long as they would be faithful in paying of rent after that date?

A. No. It really wouldn't be fair to our family or to the other kids to forget about that grant that they owed. I always --

Q. That's not my question whether it's fair or not. I'm asking you if you did make a representation to your son that you were going to forgive that debt?

A. No.

MR. WEIGHT: Okay, that's all.

THE COURT: Mr. Neeley.

MR. NEELEY: Thank you.

CROSS EXAMINATION

BY MR. NEELEY:

Q. When they took over the store the rent was different than it is now; is that correct?

A. Right.

Q. How much -- do you recall how much it was at first?

A. When we were first starting out, we set the -- Robert figured the rent for the space that we had -- for the space Alan and Debbie had to be 1400. Then they were having a hard time, so he reduced the rent to 700. Then they deducted the amount of the -- our cancer insurance payments. So it made the rent 650. My husband said we needed to always raise the rent, but they didn't seem to be able to make the rental payments. In fact, they were borrowing money all of the time, and so we just didn't ever raise the rent.

Q. Okay, but you did raise it after that to 1,050?

A. When Jerry and Diane moved out of the building then they were using that space.

Q. Okay. Then they got more space, you raised the rent?

A. Right.

Q. Okay, to 1,050?

A. Yeah.

Q. And they continued to pay your insurance?

A. Yes.

Q. And they continued to do that?

A. Uh-huh.

Q. Now, while Debbie was running the store and paying the bills, did she ever tell you she was not going to pay you your rent?

A. No.

Q. You can't remember having conversations with her about the payment of rent?

A. We tried to settle up with the rent, rental payments, and tried to meet and do it, but we had a hard time getting together.

Q. Okay. The exhibit that Counsel showed you, the 2nd and 3rd page, was that prepared by -- who prepared the 2nd and 3rd pages of that?

A. Jerry put it on my computer as a spreadsheet.

Q. Okay, and that was based on the information that you gave him?

A. Yes.

Q. From the records that you kept?

A. Yes.

Q. In regards to exhibit -- oh, the exhibit that we talked about that has the -- I think it's No. 6. It has the amount due.

THE COURT: Exhibit 6, okay.

Q. BY MR. NEELEY: I'm going to hand you what's been marked Exhibit 6, okay? Do you recognize that document?

A. Yes.

Q. Did you work on that yesterday and last night and this morning?

A. Yes.

MR. WEIGHT: Your Honor, I'll object to this testimony, and I'm going to do it on the basis that I've raised objections previously. That is, that this part of the case is not before the Court. It's been resolved. That has been paid, and there is simply nothing here for us to address.

THE COURT: I think there is. The testimony is quite clear that everything was mixed and mingled. There were payments that were showing up as this or that, applying it towards the loan payment, but it looks to me like its paying may be applied towards rent. I don't know how you can sort the two out, and that's just from the testimony I've heard. I do think it's relevant, and I am going to consider it. So go ahead and ask the questions, Mr. Neeley.

Q. BY MR. NEELEY: How did it come about that you needed to work -- well, first, what kind of relationship did you guys form in regards to the motel?

A. RCI was a partnership, limited liability company, and we -- with four members; Alan and Debbie and my wife and myself.

Q. Alan and Debbie had it before you got involved?

A. Right.

Q. Correct? They had been partners?

A. They had two partners, actually.

Q. Okay, and then when you got involved did you infuse additional capital into the partnership?

the last two pages appear to be the actual offer to purchase.

THE WITNESS: Your Honor, I'm getting there.

THE COURT: No, hang on. Hang on.

THE WITNESS: Yeah.

THE COURT: So what's your objection now?

MR. WEIGHT: My objection is this, your Honor. He's testifying that they gave her what she wanted. In other words, like, "We were under pressure to sell this property. She was making demands, and so we gave her what she wanted." That's not what this agreement says. It says something quite different than that in paragraph 4.

THE COURT: I don't know that it contradicts. It says, "The parties represent and agree that she'll get that much money."

MR. WEIGHT: The words I'm looking at --

THE COURT: And they were to --

MR. WEIGHT: -- says, "Receive as her share." So if she received that as her share, that assumes that everybody agreed that that was what her one-quarter interest of the business to be, her share, $200,000. All of the negotiations that went into arriving at that are merged in that paragraph, and the $50,000 he's testified about and all these other representations are merged into an agreement that that's her share.

THE COURT: Okay. So if -- and since he and -- so if I

sustain what you're saying, if I do that, what have I got here? What I've got is --

MR. WEIGHT: What I think you've got is you've got to throw out his testimony, because --

THE COURT: Well, how do I figure -- since these guys are mixing money back and forth, I've got to come up with something. Do I just simply say, "Fine, $200,000 to her and $200,000 to him"? Because I'm willing to do that, but I don't think that's what you want, and I'm more than happy to say that both of these people get $200,000 credit for the motel interest, period.

That -- and if you want that, we're done with the questioning. I'll take it as the evidence, and I'll move on, or we could hear what he's got to say, but I don't think you can have it both ways, Mr. Weight.

MR. WEIGHT: Well, I don't know (inaudible). We don't know what he got, but what I'm --

THE COURT: That's ex -- and I've got to come up with some number, because I'm going to find that these parties owned interest in these things and they were married at the time this happened. So either I'm going to get testimony to come up with it or I'm going to say they both got $200,000.

So your choice is I either hear what's going on, and I may decide that yeah, it was some different number, or I'm going to just give it 200 each and be done with it, because as

I see it, this is a package deal, and you want to separate this out, and given the evidence I've heard today, I can't sort this out. I cannot just sequester this one little thing and say, "She gets $200,000 free cash." I can't do that.

MR. WEIGHT: Okay. Well, if the Court can't do that, then I guess --

THE COURT: You see what I'm saying? I just -- these parties, had they kept separate accounts, had they never done anything to comingle funds, had they never done anything like that, I would have bought what you've -- but the evidence isn't that way.

MR. WEIGHT: Well, my position on that is this, your Honor. It got to a point where there's going to be one marital asset (inaudible). We entered in negotiations with the parties that were buying this property, and then we also entered into negotiations between the four owners of the business; Jerry and his wife and Alan and Debra.

THE COURT: Yes, sir, you're right.

MR. WEIGHT: And there were a lot of numbers that were put back and forth between these parties on what they thought their claims were and what they thought the equity of the business was so it could then be divided four ways to give it to the four partners.

They finally settle on a number that we presented, and the number that we presented was that we think -- now they say

we had disputes with their numbers, but all we were really trying to do is take the sales price of 4.2 million dollars, subtract out all of the reasonable expenses that should be subtracted out to get to an equity, and then divide that by four.

We did all of that, and the process resulted in my client getting $200,000. Now they're going to say, "No, we overpaid her.

THE COURT: Given what you just said, if the amount was divided by four and it's $200,000, I'll give her $200,000, he gets $200,000 when I figure out my total numbers. Fair enough with me. Then in that case, Mr. Neeley, I won't accept any more testimony on this matter.

MR. WEIGHT: That's what we think that the motel part of this case is all about, but what I'm concerned is --

THE COURT: (Inaudible) --

MR. WEIGHT: -- I'm not sure I agree with the Court's statement that you're going to say at least get 200 and --

THE COURT: I'm going to do a little sheet and say -- because this is in the middle of the divorce, it's 2003, and if I put 200,000 on her ledger, I'm going to put 200,000 on his ledger, call it quits and be done. If you don't -- because you don't want me to hear any more of his testimony and I've not heard any other dollar figure other than that, and I'll be happy to do that. We'll be done with Jerry's -- at least this

line of testimony. Mr. Neeley can certainly ask him about other things. I don't know what he's going to say.

MR. WEIGHT: Well, I don't either. All I know is that she had $200,000. It was by this agreement she got it, and it was after all of the negotiations represented her one-quarter interest in both the motel property, and six acres adjoining.

THE COURT: Okay, I'm going to sustain the objection. Don't ask any more questions about this. Each of them will have $200,000 on the final ledger sheet as their interest in the hotel.

MR. NEELEY: What he should receive?

THE COURT: Yes, sir, that's right.

MR. NEELEY: Even if he didn't receive it?

THE COURT: We're taking no more testimony on it. That's -- when I do my ledger, that's how we'll do it. Any other questions you want to ask Mr. Larsen?

MR. NEELEY: No.

THE COURT: Or Mr. Jerry Larsen?

MR. NEELEY: No.

THE COURT: Mr. Weight, anything you'd like to ask him?

MR. WEIGHT: No.

THE COURT: Thank you very much, sir. You can have a seat. Okay, Mr. Neeley, we're still to you. Anything else you'd like to offer?

MR. NEELEY: Yes, I would call Mr. -- well, I could

proffer.

THE COURT: Why don't we do a proffer, because we're running --

MR. NEELEY: Okay. Mr. Larsen would proffer, your Honor, that he does not have a two-year degree. He did attend Snow College, but he never got a two-year degree. That he doesn't have any other training other than what he's received as a salesman in the furniture business. That after he completes -- that his brother has agreed to pay him $1,500 a month, that's while he liquidates -- a month, while he liquidates the inventory from Fashion Furniture. After that he will be unemployed. He did not tell the custody evaluator he was going to Las Vegas, because he does not intend to leave the area. He hopes to find a job selling somewhere here.

THE COURT: Okay. You'll accept -- is there basically rebuttals of those particular things? Did you want to cross examine him on those issues?

MR. WEIGHT: I don't need to cross examine him, your Honor.

THE COURT: Okay. Anything else, Mr. Neeley?

MR. NEELEY: No.

THE COURT: Over to you, Mr. Weight. Anything else you'd like to present?

MR. WEIGHT: Your Honor, I didn't ask my client about Exhibit No. 27. If the Court will get that, I'll just tell the

Court what her testimony was going to be.

THE COURT: Which one is 27?

MR. NEELEY: That's the --

THE COURT: Oh, okay, good. That's this most recent one. Okay, go ahead. You're going to make a proffer about that. Please do.

MR. WEIGHT: (Inaudible) wasn't initially (inaudible)

THE COURT: Yeah, okay.

MR. WEIGHT: And she will testify that before we agreed finally, that the business would be evaluated and we would use the value of inventory as of November 1st, 2002. Before that all occurred and we reached that agreement, we actually did it on an order to show cause hearing.

We were trying to figure out how much my client should get for Fashion Furniture. We had taken care of the motel matter and were trying to resolve Fashion Furniture. So these exhibits, the one No. 27 was prepared simply as her calculations of what she thought the value of the business was, what she thought she should receive.

That exhibit I think doesn't really help us at all, because the -- as part of the negotiation, whereas the other exhibit, No. 26, is simply a business record. That would be her testimony, your Honor.

THE COURT: Mr. Neeley?

MR. NEELEY: Nothing further, your Honor.

you.

THE COURT: Go ahead.

MR. WEIGHT: Your Honor, my summary of the argument is -- was written for my benefit so I could go through and argue to the Court, and I'll go through it simply so that the Court understands what I'm doing here.

THE COURT: Okay.

MR. WEIGHT: We indicated to the Court that in the telephone conversation we had with Bruce Hughes he told us that the value of the inventory as of 11/1/02 was $300,000, the report he has, which is admitted as an exhibit. He states in bold on the second page that he gives it a range of 300,000 to 325.

I did not -- I subpoenaed him, but I released him from the subpoena because I was confident that he would testify just exactly what his reports states. So we proffered it, but the argument that I've made, or this summary here, I'm using the $300,000 figure. If the Court after reading the evaluation, the business evaluation determines that more than 300,000 should be the starting number, then the Court can add to my bald calculations my clients share.

We start, your Honor, with the rent issue. That's the first deduction I show from the business equity value. It's our position that the amount of $18,600 is owed, and we come to that number this way. For four years the total rent of -- that

was paid at the rate of $1,050 would be $50,400. We deduct from that the amount of $15,000, which comes in Exhibit 12, showing that there were a 5,000 and a $10,000 payment, and then in addition they wanted $12,600, and then $4,200, which represents payments made July, August, September, October, and right after -- well, I can show the Court where he does it.

On Exhibit 12 --

THE COURT: Okay, I'm looking at Exhibit 12.

MR. WEIGHT: And it's page 3 of the last group of pages.

THE COURT: Okay.

MR. WEIGHT: January, February, March, April of 2003 there's acknowledgment that that amount of money was received, and we claim that that should be deducted.

THE COURT: Right.

MR. WEIGHT: That amount of deduction --

THE COURT: Okay, slow down. You just -- you've lost me. You said 15,000, 12,600, and 4,200?

MR. WEIGHT: Yes.

THE COURT: Those are the amounts?

MR. WEIGHT: That's right.

THE COURT: From the $50,400?

MR. WEIGHT: That's correct, and then --

THE COURT: And those figures came from page 3?

MR. WEIGHT: Well, if you're looking for all the

figures, they came from the first page --

THE COURT: Okay, I can find the 2001, 12,600 for the year 2000. I found that.

MR. WEIGHT: Okay, and right above that there's 5,000 and 10,000 for --

THE COURT: Okay. All right, and that's the 15,000?

MR. WEIGHT: That's the 15.

THE COURT: Okay.

MR. WEIGHT: Then on page 3 where you've seen 4,200.

THE COURT: Fine.

MR. WEIGHT: Okay.

THE COURT: Let's see, page 3, 4,200?

MR. WEIGHT: At the very bottom of the page at the corresponding number.

THE COURT: You bet. Show me -- oh, page 4.

MR. NEELEY: I don't have a page 4.

MR. LARSEN: Where does it show that?

THE COURT: Right there. Okay.

MR. NEELEY: This is page 4?

THE COURT: It's page -- it's not 4 either. It's 1, 2, 3, 4, 5, 6.

MR. WEIGHT: The summary of it all, your Honor, is on the very, very last page of Exhibit 12.

THE COURT: Okay, I'm with you. All right.

MR. WEIGHT: And so the 18 -- there's $50,400 minus

the 31, 8000 -- 31,800, excuse me, which consists of the 15, 12,6 and the 42. Leaves a balance of $18,600 that is owed to Mr. and Mrs. Larsen, and that's the first thing I put in my summary of the argument.

THE COURT: Okay, I'm with you. I understand that.

MR. WEIGHT: Right.

THE COURT: Slow, but I pick it up eventually.

MR. WEIGHT: I'm glad I don't have to be in your position. Under that you see it says, "Zero important." Takes our argument that there was some agreement that all past due would be forgiven as of 7/7/02. It's paid current from that date, so (inaudible).

THE COURT: Okay.

MR. WEIGHT: Credit card debt, we represent that from the amount of the business equity, business value should be deducted 22,742.23. That is on Exhibit 3. We both stipulated to that number.

THE COURT: Okay.

MR. WEIGHT: Then we've deducted it as a business debt, and their number of $10,731.14 on Exhibit 11, we accept that, and then the big squabble is over the business debt, which is the amount that I had indicated to the Court as 28,566.87. I get that number by looking at Exhibit 31 and Exhibit 6.

If I may, your Honor, on Exhibit 6, Exhibit 6 is a large exhibit that has a big paperclip on the left-hand side.